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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 839

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DEREK JEROME SINGLETON, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

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No. 839

Jackson Municipal Separate School District, *et al.*,

Petitioners,

v.

Derek Jerome Singleton, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinions of the United States Court of Appeals have now been reported: The May 5, 1970, opinion appears at 426 F.2d 1364, *modified,* 430 F.2d 368 (July 20, 1970); the August 12, 1970, opinion appears at 432 F.2d 927.

Question Presented

Whether the court of appeals was correct in rejecting plans of desegregation formulated by defendants and HEW when there were available feasible alternatives which promised to more effectively eliminate the dual racial system of pupil assignment.

Statement

The present phase[1] of this litigation began with the opinion-order of the court of appeals, December 1, 1969, 419 F.2d 1211. There the court found a freedom-of-choice plan ineffective under *Green* v. *County School Board,* 391 U.S. 430 (1968), and directed the district court and defendants to seek the assistance of the Department of Health, Education and Welfare in the formulation and implementation of a new plan of pupil assignment. Although plan formulation was to begin immediately, implementation was to be deferred until the commencement of the 1970-71 school year. This Court reversed as to timing holding that these defendants must implement a new plan of pupil assignment commencing with the second semester of the 1970-71 school year. *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970).

In accordance with the mandates of this Court and the court of appeals, educators affiliated with the Department of Health, Education and Welfare, entered the school district and formulated plans of desegregation; their pro-

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[1] This suit was filed in 1963 by the late Medgar Evers in behalf of his school age children. Virtually every scheme for evasion and delay has been tried at least once by the defendants. *Evers* v. *Jackson Municipal Separate School District,* 328 F.2d 408 (5th Cir. 1964) (failure to exhaust administrative remedies under the state's Pupil Placement Act); *Jackson Municipal Separate School District* v. *Evers,* 357 F.2d 653 (5th Cir. 1966) (innate differences between races and Negro inferiority justified segregation); *Singleton* v. *Jackson Municipal Separate School District,* 348 F.2d 729 (5th Cir. 1965); 355 F.2d 865 (5th Cir. 1966) (freedom-of-choice on a grade-a-year basis); *Singleton* v. *Jackson Municipal Separate School District,* 404 F.2d 353 (5th Cir. 1968) (effort to avoid uniform *Jefferson* decree's periodic reporting provisions by arguing that compilation of statistics by race was impossible since black children were part white and part black); *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969) (effort to construct new classrooms and black schools which would have the effect of promoting segregation).

posals were filed in the district court on January 6, 1970. Defendants filed their own proposals on January 19, 1970.

HEW and defendants submitted very similar elementary plans: both relied on geographic zoning and both contemplated the retention of elementary schools serving grades 1-6. At the junior-senior high school level, HEW advanced three alternatives which relied upon "pairing"[2] and geographic zoning. Defendants advanced a separate proposal for junior-senior high schools which geographically zoned existing schools but which eschewed "pairing."

Hearing on the alternative plans was held on January 19-20, 1970. January 22, 1970, the district court entered its order rejecting the HEW alternatives and approving, without significant variation, the plan of pupil assignment advanced by defendants for both the elementary and secondary schools of the district. *Singleton, supra,* 426 F.2d at 1367.

January 27, 1970, plaintiffs noticed their appeal. May 5, 1970, the appeals court reversed, holding under the standard established in *Green* v. *County School Board,* 391 U.S. 430, 439 (1968), that: First, the HEW junior-senior high proposals were "more promising in their effectiveness" than the plan advanced by defendants and approved by the trial court; and, secondly, that the HEW junior-senior high plans were educationally, administratively and economically feasible.[3] *Singleton, supra,* 426 F.2d at 1366-67.

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[2] For example, Plan "B" which was finally approved by the appeals court with modification (430 F.2d 368), paired black and white schools which formerly served contiguous "neighborhoods." One school was established for grades 7-8 and the second for grade 9. Similarly at the high school level contiguous school and "neighborhoods" were paired so that one school served grade 10 and the second served grades 11-12.

[3] Accordingly, HEW junior-senior high school plan "B" as modified by the appeals court (*Singleton, supra,* 430 F.2d 368), was implemented in September 1970.

At the elementary level the appeals court held the district court approved plan facially invalid: 11 of 38 elementary schools would remain completely segregated. Actual enrollments compiled during the 1970-71 school year revealed further that the district court approved plan had resulted in 11 all-black or virtually all-black schools and 8 all-white or virtually all-white schools. The district court was directed to request the submission of additional plans from the parties, a bi-racial committee and HEW "to eliminate the dual system which still remains in the elementary level." *Singleton, supra,* 426 F.2d 1364 at 1369.[4]

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[4] Petitioners have twice quoted plaintiffs' brief out of context to force the conclusion that we were satisfied with the elementary plan approved by the district court. The first excerpt from plaintiffs' brief cited on p. 7 of the Petition for Writ of Certiorari is as follows:

> "Nor does the instant appeal raise any issue regarding the 5 all-Negro and 6 all-white elementary schools resulting from the HEW plan of desegregation. Plaintiffs do not, at this time, seek review of the elementary plan and will explore other elementary plan alternatives before proceeding further in the district court, on this facet of pupil assignment." [Only the first sentence above appears in the Petition for Writ of Certiorari.]

In addition, plaintiffs clearly had reference to the HEW junior-senior high school plans when we asserted that "rarely has this court been confronted with HEW plans as carefully prepared as those for Jackson. . . . They should be entered in this school case." Defendants' petition for writ of certiorari, page 7, quotes us out of context.

At no time did plaintiffs endorse the elementary plan of pupil assignment advanced by HEW and defendants. Rather, we concluded on the basis of our experience with HEW and the executive department that plaintiffs would have to undertake their own plan formulation at the elementary level. Defendants' assertion that plaintiffs found the HEW plan adequate because we failed to oppose it in the appeals court misses two important points: First, under *Brown II* the district court is required to retain jurisdiction to evaluate and review plans of desegregation and hence they found injunctive relief is always available; secondly, that plaintiffs found the elementary plan so inadequate that we concluded that assistance from HEW at this level should not be forthcoming.

Upon remand the HEW team which had formulated the January, 1970, plan was enlarged with the addition of two school administrators, experts in transportation. This team convassed the school district anew and on June 1, 1970, filed its new proposal in the district court. The bi-racial committee, possessing limited resources and expertise, submitted a plan which relied heavily upon and did not vary significantly from the HEW plan rejected by the May 5, 1970, opinion of the appeals court. Plaintiffs endorsed the new HEW plan with modifications. Defendants eschewed the new plan formulation and espoused its January proposal despite the opinion and order of the appeals court: later they indicated that they would acquiesce in the bi-racial committee proposal.

The new HEW plan was a "substantial improvement" over the bi-racial committee (and hence original HEW) plan. *Singleton, supra,* 432 F.2d at 929. The new proposal relied somewhat upon the "pairing" and "clustering" of elementary schools. And an essential feature of the plan called for the transportation of approximately 20% of the total elementary student enrollment.

The district court rejected the HEW proposal and in its order of June 15, 1970, endorsed the bi-racial committee plan without significant variation. And plaintiffs again appealed.

August 12, 1970, the appeals court reversed. However, it declined to decide the question of whether defendants were constitutionally required to implement a plan of pupil assignment which called for the transportation of pupils:

> There was much discussion in the brief that under [the new HEW elementary plan] . . . it will be necessary for the school district to provide intra-city transporta-

> tion for the plans to be effective. But we do not reach this since the changes we mandate persuade us that there is a variety of ways to improve the result. *Singleton, supra*, 432 F.2d at 929.

Instead, the appeals court turned to *Green, supra*, for guidance. Relying upon its numerous decisions holding that "pairing" and "clustering" of schools was educationally and administratively feasible, the appeals court ordered that several named elementary schools, located in reasonably close proximity to one another, be "paired" or "clustered." Finally, the district court was directed to conduct further hearings no later than September 25, 1970, to fully explore the "pairing" and "clustering" techniques, a new elementary plan was to emerge from these hearings with implementation assured for the second semester for the 1970-71 school year. These hearings have not yet been held; the Fifth Circuit has approved a continuance pending decision by this Court in the pending Charlotte-Mecklenburg and Mobile cases. *Swann* v. *Charlotte-Mecklenburg Board of Education*, Nos. 281 & 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County*, No. 436, this Term.

ARGUMENT

This Court's holding in *Green, supra,* established a standard for reviewing the alternative plans of desegregation:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . . The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan premises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. *Green, supra,* 391 U.S. 430, 439.

Thus, the constitutionality of a given plan of desegregation is measured by the result achieved and educational feasibility. And the thrust of both the May 5, 1970, and August 12, 1970, opinions of the appeals court is that "pairing" and "clustering" of schools is educationally sound and feasible under *Green.* A plan of pupil assignment which achieves substantial integration does not suffer from its reliance upon "pairing" or "clustering."

Despite defendants' protestations, expert educators in many school desegregation cases reaching the appeals court in the past year have advanced cogent arguments in support of "pairing" and "clustering" of schools. Dr. Winecoff, who headed the HEW team which prepared the alternative plans for desegregation for Jackson, testified as follows:

Q. Doctor, has there been any discussion in publications and among professional educators with regard to the advantages and disadvantages of the junior high school?

A. This is a topic which has been under much discussion recently among educators. The junior high school movement got its start, a big impetus in New Jersey some years ago and has just about seen its day in New Jersey. They have moved away from it and this is happening in many other areas. The thinking is that the 6-3-3 system hasn't done the job it was designed to do. It was designed to take care of the particular needs of a particular group of students and we've seen several things which give us some indication that maybe that wasn't a good choice. Ninth grade students seem to have as much or more relationship with tenth grade students than with eighth grade students, for example, and certainly than with seventh grade students. They are maturing earlier. We can chart this—that youngsters are maturing earlier, physically, mentally and emotionally. This is a second reason for moving away from the junior high school. *The third and most important reason, in my opinion, is that perhaps the organizational structure is much less important than the program provided and that the program can be provided in almost any type of structure which the school district devises and sees as meeting the needs of its students.* This can be a 6-2-2-2, it can be a 4-4-4—which receiving a lot of support today from the original junior high school proponents. (Transcript of Proceedings in District Court, January 19-20, 1970, pp. 145-146; Emphasis Added.)

The record on appeal in *Henry* v. *Clarksdale Municipal Separate School District,* 433 F.2d 387 (5th Cir. 1970), contained the testimony of Dr. Forrest Murphy, Dean of the University of Mississippi School of Education from 1946 to 1960:

> Q. Dr. Murphy, would you give us your view on the 6-3-3 grade structure or, alternatively, what you consider to be a sound educational structure for a school district?
>
> A. Well, there are many different possible organizations of grade structure which will provide for an educational setting which would be efficient. The 6-3-3 idea emerged about, I suppose, the mid-twenties, superseding what had been a grade structure of 8-4. There have been many combinations since tried, 4-4-4, 4-3-5, *almost any combination of grades, so that it seems to me that the organizational pattern is not as important as how this pattern is administered and the instruction which is carried on within the pattern.*

Only after reviewing and approving the pairing techniques many times did the appeals court speak definitively on the subject:

> In the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist. And it is clear that one acceptable way to achieve reasonable alternatives is by pairing schools. The tenor of our decisions is unmistakable where all-black or virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black

> schools by using the tool of pairing, the tool must be used. Thus we have required the pairing or clustering of schools in Dade County, Fla., in Pinellas County, Fla., in Hillsborough County, Fla., in Alachua County, Fla., in Clarksdale, Miss. and in Jackson, Miss., to mention only a few instances. It is now clear beyond peradventure that the tool of school pairing—a most viable tool in the school desegregation process must be embraced where it is practicable and desegregation cannot be achieved by other means . . . *Allen* v. *Broward County, Fla.*, 432 F.2d 362, 367 (5th Cir. 1970) (citations omitted).

Thus, on the basis of compelling testimony repeated in case after case the appeals court concluded that a plan of pupil assignment which relies upon "pairing" and "clustering" of schools is educationally feasible and hence a valuable and viable tool for achieving unitary systems under the *Green* standard. Defendants herein were simply unable to convince the appeals court to the contrary.

It is significant that the court below expressly declined to journey beyond *Green* despite a clear opportunity to do so. The appeals court had before it a new plan of pupil assignments which contemplated the transportation of pupils to attendance centers and which was endorsed by the HEW team.[5] But the court declined to decide whether

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[5] The following endorsement of the new HEW elementary plan was entered by Dr. Winecoff at the hearing held on June 8, 1970:

> Q. Would you tell us what position the HEW team took as to the administrative, educational and economic feasibility of this [new] plan now before the court?
>
> A. This new plan we took into consideration administrative, economic feasibility and came up with a plan which seemed to us reasonably economic, administratively feasible and educationally sound (Tr. p. 46).

a school district should be compelled to maximize desegregation through provisions for student transportation. *Supra,* pp. 5-6. In addition, defendants objected to the new HEW plan on the ground that it would require defendants to transport students intra-city and that such transportation is prohibited by state law. Again, the appeals court by declining to decide whether the new HEW plan should be implemented sidestepped the question of whether state laws may be interposed to frustrate a constitutional mandate.

Rather than decide these important questions without guidance from this Court, the appeals court called for further hearings to be held after disposition of the Charlotte and Mobile case pending in this Court (Appendix A hereto). This approach assures petitioners a second opportunity to advance its own proposal or enter cogent objections to any other alternative plan more exacting than the existing plan mandated by *Green.* Thus review by this Court does not seem warranted at this stage of the litigation.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Fifth Circuit No. 29226

DEREK JEROME SINGLETON, *et al.*,

Plaintiffs-Appellants,

v.

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

Defendants-Appellees.

District No. 3379

DEREK JEROME SINGLETON, *et al.*,

Plaintiffs,

v.

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

Defendants.

ORDER FURTHER ENLARGING TIME FOR HEARING

WHEREAS an order of the United States District Court for the Southern District of Mississippi was filed on January 19, 1971, enlarging the time to begin a hearing on a new elementary school plan in the above styled cause to February 1, 1971, and it appearing that a request has been made by the defendant school board for a further enlargement

of time pending the present litigation before the Supreme Court, the result of which may be pertinent to this cause and this Court having conferred with and been advised by Hon. John R. Brown, Chief Judge of the Fifth Circuit Court of Appeals, that authority is granted to this Court to further enlarge the time and grant a delay of the hearing to February 22, 1971, or sooner if the Supreme Court renders a decision on the litigation pending before said Court;

It is therefore ordered that a further hearing in this cause before the district court is postponed until February 22, 1971, or sooner, if the Supreme Court renders a decision in the litigation presently pending before it.

So Ordered this the 29th day of January, 1971.

Dan M. Russell
United States District Judge